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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-749

JOHN J. HURLEY, INDIVIDUALLY AND THE SOUTH BOSTON ALLIED VETERANS COUNCIL,

Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF THE ASSOCIATION

Respondents.

On Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

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PETITIONER'S RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

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PETITIONER'S RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

This appeal is not moot. The appeal concerns a decision of the Supreme Judicial Court of Massachusetts ("SJC") which violates the first amendment rights of petitioners John J. Hurley and the South Boston Allied War Veterans Council ("the Veterans"), based on that Court's interpretation and application of the Massachusetts Public Accommodations Statute, M.G.L. c. 272 §§ 92A & 98, and the United States Constitution. *First*, as a result of the Massachusetts decision, the Veterans currently live under a permanent injunction which acts as a prior restraint on their

free expression, in stark violation of the first and fourteenth amendments to the United States Constitution. *Second*, the Veterans have been subjected to substantial fines because of activity protected by the first and fourteenth amendments.[1] *Finally*, the Veterans are potentially subject to criminal penalties arising out of the Massachusetts Court's decision—all because they wish to exercise fundamental first amendment rights.

None of this has been altered or affected in any way by the recent decision of the U.S. District Court for the District of Massachusetts, which forms the sole basis for respondents' Suggestion of Mootness. This case remains a live controversy in which the Veterans have an obvious and critical stake. The appeal is therefore far from moot. This Court's consideration of this live controversy is the only hope of ending an ongoing violation of the Veteran's constitutional rights.

BACKGROUND

Respondents' Suggestion of Mootness is founded entirely on their interpretation of a declaratory judgment issued on January 17, 1995 by the United States District Court for the District of Massachusetts, *Allied War Veterans Council, et al. v. City of Boston, et al.*, No. 94-11402MLW (D. Mass. 1995), and its effect on the Massachusetts Supreme Judicial Court decision that is the subject of this appeal. The recent federal district court case deals exclusively and narrowly with *this year's* St. Patrick's Day Parade, which includes a protest theme in response to the censorship of the free expression of the petitioners by the Commonwealth of Massachusetts. In contrast, the decision of the Massachusetts Supreme Judicial Court, which is the subject of this appeal, concerns the traditional St. Patrick's Day Parade held by the Veterans. The usual parade is not a protest, but a celebration honoring St.

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[1] In addition, the Veterans have been ordered to pay $42,046.98 in attorneys fees to the respondents in this case, and another motion for an additional $43,711.96 is still pending against them.

Patrick and expressing support for traditional religious and cultural values.

The parade as traditionally constituted by the petitioners is enjoined from proceeding as it has in the past. As such it was held to be violative of a Massachusetts Public Accommodations Law. The judgment and order enjoining the Veteran's expression, and imposing financial penalties, remains in effect today. Perhaps more egregiously, the Massachusetts Court's decision attempts to expressly dictate the expressive content of the parade. In other words, the Veterans are no longer allowed to express what they have expressed annually for forty-seven years. If left unchallenged, the decision of the Supreme Judicial Court will remain the law in Massachusetts, the Veterans will be forced to pay substantial fines penalizing the content of their speech, and they will live under a prior restraint preventing them from ever again expressing themselves as they have for nearly half a century.

Petitioners' Suggestion of Mootness misstates many facts and mischaracterizes both the recent decision by the U.S. District Court in Massachusetts and the Massachusetts Supreme Judicial Court. A reading of both decisions immediately reveals the meritless nature of petitioners' eleventh-hour mootness suggestion. The federal district court in Massachusetts stated repeatedly, clearly, and explicitly that the Court considered a *limited* controversy, and that its consideration of that limited controversy has no bearing on the ongoing dispute over the decision of the Massachusetts Supreme Judicial Court.

The United States District Court for the District of Massachusetts addressed the issues of free expression and association surrounding the "materially different" Saint Patrick's Day Parade scheduled by the Veterans for 1995. District Court Op. at 3. The District Court correctly recognized this protest component of the 1995 parade as a "new controlling fact," District Court Op. at 4, and it made clear that its decision should not be regarded as a comment on the

correctness of the prior decisions of the courts of the Commonwealth that are at issue before this Court. The federal district court went to great lengths to emphasize that it was deciding a very narrow issue regarding only the 1995 Veterans' parade. The district court stated unequivocally that it was not addressing or deciding any issue presently before this Court relating to the decision of the Massachusetts Supreme Judicial Court: "Nor should this decision be regarded as a comment on the correctness of the prior decisions of the courts of the Commonwealth concerning the unfortunately *enduring* dispute between the Veterans and GLIB. Only the Supreme Court can review the Supreme Judicial Court's decision regarding the 1993 Parade; it has agreed to do so. This Court has addressed a materially different matter." District Court Op. at 7 (emphasis added).

ARGUMENT

A case is moot only if the issues presented are no longer live or if the parties lack a legally cognizable interest or "personal stake" in the case. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395 (1980). Neither is true here. In this case, the Veterans assert that the Massachusetts Supreme Judicial Court's permanent injunction violates their fundamental constitutional rights. The Massachusetts Court issued a permanent injunction against the traditional parade, and levied fines and other financial penalties. If the Veterans win in this Court they will be freed from the injunction and the fines. They again will be able to conduct the parade exactly as they did before the Massachusetts Court entered its injunction.[2] They will no

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[2] Any suggestion that the Veterans have "permanently" altered the regulations governing the parade, Resp. Br. at 7 n.2, or that "there is no reasonable expectation that the petitioners will return to the manner of running their parade as they did in 1993 (and intended to in 1994) where the courts have warned them away from such a course," Resp. Br. at 11 n.4, is false. The Veterans emphatically wish to return to the way they have run

(continued...)

longer be subjected to the onerous penalties on speech imposed by the court below. There simply can be no more serious or "legally cognizable" interest, nor a more personal stake, than the vindication of the fundamental rights of free expression and free association guaranteed by the United States Constitution.

In this case, the Commonwealth of Massachusetts is not only permanently banning the Veterans' speech in the future based solely on its content, but also exacting financial (and possibly criminal) penalties based solely on the content of the Veterans' past speech. It cannot be seriously asserted, then, that this case is moot. This case presents the Court with an ongoing and egregious violation of the constitutional rights *of the Veterans*. The harm from such a violation is irreparable. The controversy is live. The stakes are high. Any suggestion of mootness is specious.

The ongoing effect of the decision of the Supreme Judicial Court is most directly illustrated by the very fact that the Veterans have been forced by the Massachusetts Court to drastically alter the content of this year's parade. As stated, this year's parade is not the usual celebration, but also features a protest theme against the state-imposed bar on the traditional parade. The non sequitur that provides the sole basis for the respondents' mootness suggestion is that because a federal court has held that the Constitution protects the 1995 protest parade, this Court is now prevented from considering the merits of the main controversy arising from the deprivation of constitutional rights which is itself the subject of the protest theme of this year's parade. To state this position is to refute it.

The Veterans have temporarily altered their conduct to protest recent decisions by the Commonwealth courts. The addition of a protest component to the traditional celebration of

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[2] (...continued)
the parade for the last 47 years. That is precisely why the Veterans petitioned this Court to review this case.

St. Patrick, the traditional family, and the values it exemplifies is an emergency response to recent judicial mandates forcing the association of two radically disparate groups representing two radically different messages. This protest is a temporary divergence from the goals that have traditionally motivated the parade organizers, namely the honoring of St. Patrick and the celebration of the important role traditional families and values play in society. This change is a direct response to adverse decisions by the Massachusetts courts which have outlawed the expressive content of the Veterans' traditional parade.

Under GLIB's reasoning, any time a court issues a prior restraint on speech, and the speaker abides by the injunction not to speak, then the very act of remaining silent renders the case moot. So, according to GLIB, because there is no more speech, there can be no more dispute over a permanent order preventing such speech, even though the existence of the injunction is the sole reason for the silence. Therefore, if a litigant chooses to abide by an injunction while his appeal is pending, GLIB argues such compliance itself renders an appeal moot. In other words, only lawbreakers can appeal. Such tortured reasoning falls under its own weight. It would leave litigants with the Hobson's choice of either defying a court order and risking civil and criminal contempt sanctions, or abiding by the order and, by that very act, forfeiting their appeal.

Further, as this Court has often observed, even "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W.T.Grant Co.*, 345 U.S. 629, 632 (1953). "Nor can it be argued that the case has become moot because respondents have abandoned their efforts as a result of the very harassment they sought to restrain by this suit." *A.Y.Allee v. Medrano*, 416 U.S. 802, 810 (1974). This state-forced change in the Veterans' speech does not support mootness, but rather powerfully establishes the

continuing force of the underlying order and the necessity for this appeal.[3]

The continuing effect of the Massachusetts decision on the Veterans is also illustrated by the fact that the city of Boston would not issue the Veterans a parade permit this year unless the Veterans certified that they would comply with the Superior Court's permanent injunction and not exclude GLIB from the 1995 parade. District Court Op. at 16. As in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968), the Massachusetts Supreme Judicial Court's decision "continues to play a substantial role in the response of officials to their activities," *id.* at 350, and as the Court held in that case, "[i]n these circumstances, [the Court's] jurisdiction is not at an end." *Id.* As the federal district court stated, "[o]nly the Supreme Court can review the Supreme Judicial Court's decision regarding the 1993 parade," as it addressed "a materially different matter" than that which was before the district court. District Court Op. at 7..

The decision of the SJC continues to play a substantial role in the response of state officials to the actions of the Veterans in organizing the parade, making the decision the core of an ongoing controversy. The SJC's decision, if left to stand, will forever prevent the Veterans from returning their parade to its traditional purpose, namely, the celebration of the traditional family and the values it exemplifies. The Veterans

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[3] The cases cited by the respondent on the "voluntary cessation" doctrine are completely inapposite. In those cases, the defendant voluntarily ceases an offending activity because of pending litigation and an impending court order, and then asks the court to find the controversy moot so as to avoid the court order. The voluntary cessation doctrine prevents defendants from mooting cases on the eve of judgment and repeating the offending behavior: the case is not moot unless "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. at 633. In this case, on the other hand, the defendants (petitioners) have ceased the prohibited activity only because of an *actual* court order, and it is the *plaintiffs* (respondents) who wish to declare the controversy moot.

have followed the course directed by this Court in *Walker v. City of Birmingham*, 388 U.S. 307 (1967). They have sought judicial review of an injunction and refrained from disobeying it, no matter how well-founded their doubts have been as to its validity. In identical circumstances, when such a course has been pursued by petitioners in view of the continuing vitality of their grievance, this Court has stated "we cannot say that their case is moot." *Carroll*, 393 U.S. at 179.

Finally, GLIB critically undermines its mootness argument and reveals its true motives in its discussion of vacatur in the final footnote to its mootness brief. There GLIB asserts that the appeal of the Massachusetts decision should be dismissed as moot, but that the state decision and the prior restraint and penalties it imposes should not be vacated. By this statement, GLIB reveals its clear understanding that the decision of the Massachusetts Court continues to have force over the parties to this appeal and to directly affect their rights. Why else would GLIB insist that the decision be left undisturbed?

CONCLUSION

For the foregoing reasons, this Court should now resolve "the unfortunately enduring dispute between the Veterans and GLIB." District Court Op. at 7. This is a case involving a prior restraint on speech. It is a case involving fines and fees levied to punish speech based solely on its content. To be moot a decision must have no effect on the parties. This case has a direct, ongoing, and irreparable effect on the Veterans. This case is not moot. It is urgent. This

Court certainly retains the power to resolve this live controversy.

Respectfully submitted,

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